In a related vein, TCG recommends that expansion space should be offered in 20 square foot increments. TCG, however, fails even to address, let alone rebut, Pacific Bell's showing (at 59-60) that providing space in increments smaller than 100 square feet is highly inefficient, requiring more space to accommodate the same amount of equipment that can be accommodated under the existing minimum space requirements.[81] Moreover, TCG's proposed increment is smaller even than the minimum space specified by NEBS guidelines to support one equipment bay.

Finally, TCG is the only party that opposes the establishment of limits on the maximum space that a single EIS customer may occupy in one central office.[82] TCG provides absolutely no evidence to support a need for more than 400 square feet of space at a central office, the maximum area available under Pacific Bell's tariff. An area of that size, based on TCG's own computations, could be used by an EIS customer to install up to 16,000 DS1 circuits. In view of TCG's complete failure to offer any substantive basis for its

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[81] Six bays of equipment can be accommodated in a 10 x 10 foot space with a 3 x 10 foot access corridor. It would require 240 square feet to accommodate the same amount of equipment, using smaller 25 square foot increments with 15 foot access aisles.

[82] TCG at B-2. As noted previously, TCG's apparent objective in advancing this proposal is to have the opportunity to lease and occupy space in a central office for purposes other than those specified by the Expanded Interconnection Order.

complaint, the Commission should summarily reject its objection.[83]

2. Costs of Processing Additional Orders

Pacific Bell explained in detail in its Direct Case (at 62) that the same non-recurring costs that are incurred to process an initial order for floor space are also incurred to process an order for additional space because the tasks involved are the same. Pacific Bell also identified the specific types of costs that are incurred as part of this process.

TCG does not specifically challenge Pacific Bell's showing; nor does it assert that Pacific Bell will not incur any of the specific identified cost items. Instead, it relies on generalized assertions that exchange carriers "merely give the same explanation that was already given."[84] TCG also attempts to bolster its argument by claiming that the Commission should reject some of the tariffed non-recurring charges for additional order processing solely because of the amount of the charge, regardless of whether the exchange carrier has provided the necessary cost and other justification to establish the reasonableness of its charges. Although Pacific Bell's non-recurring charges are far lower than the amount cited in TCG's opposition, the fundamental

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83 Pacific Bell's restriction against warehousing of central office space is consistent with the position endorsed by the FCC in its original order.

84 TCG at B-3.

point is that the information submitted by Pacific Bell in this proceeding shows that its charges are reasonable.

Neither TCG nor any other party has refuted the showing in Pacific Bell's Direct Case that its non-recurring charges for additional space orders are reasonable. The Commission should reject the arguments of TCG, which are based on nothing more than inflammatory rhetoric.

3. Contiguous Expansion Space

No party challenged Pacific Bell's explanation of its procedures for handling requests for contiguous space. TCG, however, incorrectly asserts that Pacific Bell "will allow for cable racking in the 'Collocation Common Area,' . . ."[85] The placing of cable rack by the EIS customer in the common collocation area is not permitted.

As explained in Pacific Bell's Direct Case (at 63), "[i]f expansion must occur using noncontiguous space, the EIS customers will have access to the cable racking in the Collocation Common Area in order to cable between equipment in their respective spaces." Should Pacific Bell provide the EIS customer with noncontiguous space, Pacific Bell will allow EIS customers access to and use of the cable racking that is in place in the Common Collocation Area[86] or that will be placed by Pacific Bell as a result of building new spaces within the

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[85] TCG at B-4.

[86] The Common Collocation Area is the space common to EIS customers and only authorized Pacific Bell employees which has been designated and secured for collocation.

Common Collocation Area. The use of this cable rack will be limited to transmission facilities and interconnect cable appropriate for use with the cable rack being provided for collocation.

D. Dark Fiber Service

Pacific Bell does not offer dark fiber service.

E. Pacific Bell's Customers Will Control the Assignment of Channels on Their Networks

Pacific Bell showed in its Direct Case (at 64-65) that its EIS customers that access cross connects in a central office will determine channel assignments on their own networks. No party has challenged this contention. Indeed, ALTS is the only party that even addresses the issue. Its comment is limited to an expression of baseless "doubt" as to whether EIS customers will have the ability to control channel assignments.[87] Such an "objection" merits no response.

F. Pacific Bell's Tariff Provisions are Reasonably Designed To Promote Efficient Use of Space

TCG is the only party that objected to Pacific Bell's requirement that an EIS customer activate its equipment and interconnect one circuit within 90 days of notice that the space is available for occupancy. TCG claims that this requirement interferes with an interconnector's control over its business plans. This argument is specious. Pacific Bell's tariff provides an implementation interval which gives

[87] ALTS at 35.

the interconnector adequate information to develop its own time line that meets its business needs.[88] No public interest objective is served by permitting an interconnector to tie up valuable central office space indefinitely when it has no intention of offering interconnected competitive exchange access services to the public in the immediate future. Nor does the FCC's Expanded Interconnection Order contemplate such a misuse of central office space.

ALTS erroneously alleges that Pacific Bell's efficient use requirement interferes with an EIS customer's ability to "use space that it has paid for in a reasonable manner according to its judgment."[89] As discussed in its Direct Case (at 67), Pacific Bell's requirement applies only to customers that request expansion space. It reasonably precludes a customer from occupying additional space within a central office until that customer has efficiently used its initial space for the purpose of providing competitive exchange access services which interconnect with LEC exchange services. Further, ALTS's vague analogies to the commercial leasing industry in this context are inapposite. Commercial lessors are in the real estate business and seek to maximize their rental of space. They have no incentive to assure that their tenants use the space efficiently. To the contrary, commercial landlords benefit from inefficient use of space since tenants then lease more space than they actually need

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[88] Pacific Bell, F.C.C. Tariff No. 128, § 16.8.

[89] ALTS at 35.

for their purposes. Pacific Bell and other exchange carriers, by contrast, are not in the real estate business. Exchange carriers do have an incentive to maximize the efficient use of central office space in order to avoid needless new construction and concomitant unnecessary increases in the cost of service to all rate payers.

G. Pacific Bell's Tariff Provides EIS Customers Reasonable Notice in the Event of Termination

ALTS alleges that Pacific Bell's provision authorizing termination of service 15 days after written notification of a tariff breach is unjustified.[90] ALTS, however, gives no examples of situations where an EIS customer would not be able to cure a breach within 15 days. Rather, ALTS refers only to the adverse impact of such termination on a collocator. ALTS simply ignores the fact that compliance with the tariff's requirements is completely within the control of the customer. The fact that termination would adversely affect an interconnector's customers does not justify permitting the collocator to violate the tariff provisions governing EIS indefinitely. Absent such a termination provision, Pacific Bell would have no means of securing compliance, even though people and property are being placed at risk.

TCG protests Pacific Bell's provisions allowing immediate termination in instances where the EIS customer is responsible for a serious breach of security or where Pacific Bell's offering of EIS is found to be a violation of a rule,

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[90] ALTS at 35-36.

order, regulation, or decision issued by any administrative agency or court with appropriate jurisdiction.[91] It is noteworthy that TCG does not object to Pacific Bell's procedure for non-serious security breaches, which requires a customer to take immediate corrective action upon verbal or written notice. Pacific Bell has clearly delineated that the immediate termination provision is only applicable to <u>serious</u> breaches of security. No other commentor challenged this provision, presumably because they recognize that this provision is designed to protect not only Pacific Bell employees and facilities, but also those of EIS customers.

The basis for TCG's opposition to the provision that permits Pacific Bell to terminate a customer without notice if it does not comply with a regulation, order or other judicial or administrative mandate is difficult to understand. Presumably, TCG does not intend for Pacific Bell to continue to offer service in violation of a judicial or administrative requirement. Conceivably, TCG's concern centers around the establishment of a removal schedule, such as that which is provided in cases of termination due to an eminent domain taking. Pacific Bell is willing to modify its tariff to clarify that, to the extent practicable and allowed by the judicial or administrative body, Pacific Bell will notify the interconnector of its intent to terminate EIS in accordance with the law and establish an appropriate removal schedule with the interconnector.

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[91] TCG at B-11.

H. Pacific Bell's Tariff Properly Authorizes Termination of an EIS Customers' Service for Tariff Violations

Neither ALTS nor TCG, the only parties that object to Pacific Bell's termination provision, has offered any specific relevant standards for determining EIS tariff violations that in their view do not warrant termination. Instead, they limit their assertions to general observations that termination should only be permitted for tariff violations that are "material and serious",[92] or additionally involve "non-payment or active interference" in the exchange carriers' ability to provide its services.[93]

As Pacific Bell explained in its Direct Case (at 71-74), arbitrarily classifying certain tariff provisions as non-material would effectively deprive Pacific Bell of any means of assuring compliance. Neither TCG nor ALTS addressed this concern. Further, both parties ignore the fact that EIS customers have the ability to avoid or rectify the breach by complying with the tariff's requirements. ALTS and TCG have made it clear throughout the FCC's expanded interconnection proceeding that they expect and will insist that exchange carriers adhere strictly to the tariff requirements applicable to EIS. Exchange carriers are entitled to expect and insist on the same compliance from their EIS customers.[94]

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92 TCG B-13.

93 ALTS at 36.

94 TCG's assertion (at B-13) that its remedy in the event of an exchange carrier's breach is "to lose its access to the bottleneck" is clearly wrong. As TCG well knows, an (continued...)

TCG urges the Commission to require exchange carriers, as a general rule, to continue to provide service to an EIS customer during the pendency of a proceeding commenced under Section 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 208.[95] Such a policy is neither necessary nor desirable. The Commission possesses remedial authority to require an exchange carrier to maintain service to a customer when circumstances so warrant. The burden, however, should be on the customer to demonstrate that the issuance of such relief is justified in light of its particular circumstances. To permit the mere filing of a Section 208 action to operate as a bar against termination would simply invite the initiation of groundless actions by customers solely for the purpose of delaying the termination of their service.

With the exception of immediate termination for serious security breaches, no commentor has labeled Pacific Bell's terms and conditions which could result in termination ambiguous or subject to misinterpretation.[96] TCG, while

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[94] (...continued)
exchange carrier can be subject to formal complaint proceedings before the FCC and monetary damages if it fails to abide by its tariff.

[95] TCG at B-13.

[96] Commentors do not ask for a definition of what constitutes a security breach, but for a delineation of what is "serious" and therefore subject to immediate termination versus termination subject to prior written or verbal notification. Pacific Bell has expressed the exigent nature of these occurrences and will exercise this provision only when the potential harm to personnel, Pacific Bell facilities, or the facilities of other customers is imminent, or where the privacy of customer communications would be threatened.

recommending that ". . . there should be an opportunity for Commission review of any such [termination] action . . .," provides no specifics on what the Commission would be asked to review.[97] The purpose of this investigation is to examine the reasonableness of the terms and conditions under which Pacific Bell offers EIS. Those service terms should not be subject to yet another review for reasonableness on a case-by-case basis whenever Pacific Bell enforces its tariff provisions.

Pacific Bell does not contest the right of interconnectors to use the Commission's complaint procedure. In fact, Pacific Bell recognizes it as an effective deterrent to any abuses from the exercise of LEC termination rights (Direct Case at 69). In turn, the Commission should not permit those procedures to be abused by complainants.

I. Pacific Bell's Provisions Governing Termination In The Event of Catastrophic Loss are Reasonable

Both ALTS and TCG object to Pacific Bell's failure to establish a fixed period within which it will notify customers whether it plans to rebuild a central office in the event of catastrophic damage.[98] Neither party, however, even attempts to address the justification for this approach that Pacific Bell presented in its Direct Case (at 74-75). Nor does either party propose, let alone justify, a specific period.

TCG suggests that because Ameritech has established a notice period in the event of catastrophic damage to one of

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[97] TCG at B-13.

[98] ALTS at 36; TCG at B-14.

its offices, all exchange carriers should be able to do so.[99] This simplistic argument ignores the fact that the types of catastrophic events that are likely to occur vary among the different geographic areas that exchange carriers serve. For some carriers, the risk of massive devastation created by a major earthquake is very real, while for others the risk is quite low. Similarly, some exchange carriers annually face the risk of significant damage from destructive hurricanes or floods, while others rarely have to deal with such calamities. Further, some exchange carriers are subject to state or local restrictions which may increase the interval to collect information upon which to base their decision. When determining the content of its tariff provisions, each exchange carrier can only address the issues it knows it potentially could face in responding to catastrophic events.

Pacific Bell showed in its Direct Case that the public interest would not be served by the establishment of an arbitrary notification date, particularly because Pacific Bell has a compelling service incentive to determine as promptly as practicable whether to rebuild an end office. Further, no party has suggested in its opposition a plausible basis for the Commission to conclude that an exchange carrier would not move as quickly as possible to complete its damage analysis and make its decision. Accordingly, Pacific Bell should not be required to modify its tariff provision governing notice in the event of catastrophic loss.

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[99] TCG at B-14.

None of the parties filing oppositions supported the Commission's proposed provisions concerning catastrophic circumstances. Since Pacific Bell showed in its Direct Case that these proposals are unwarranted and unworkable, no further discussion of this issue is required.[100]

Finally, no commentor has rebutted Pacific Bell's showing that its liability provisions apply to catastrophic events as well as all other situations.[101]

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[100] TCG asks the Commission to establish "a standard for restoration of expanded interconnection facilities, which should be that interconnector facilities at [sic] returned to service at the same time the LEC's other access customers are returned to service." (TCG at B-14) Many of the concerns raised by Pacific Bell and other exchange carriers with regard to the FCC's proposals for handling catastrophic events that render central offices and interconnector space unusable also apply to TCG's suggestion. Restoration of collocation space may require more extensive repairs than those required to restore the LEC facility equipment area. In these circumstances, it would be unreasonable to deny service to all customers until the collocation space can be repaired.

[101] ALTS (at 37, G) only claims that LECs should be financially responsible for all damages which are its fault. Pacific Bell addresses ALTS concern in its liability provision (Tariff F.C.C. No. 128, Section 2.1.3(J)):

> "The Telephone Company shall be liable to a Collocator only for and to the extent of any physical damage directly and primarily caused by the negligence of the Telephone Company's agents or employees to the Collocator's facilities or equipment occupying the Telephone Company's property. The Telephone Company shall not be liable to a Collocator or a customer of a Collocator for any interruption of a Collocator's service or for interference with the operation of a Collocator's facilities arising in any manner of a Collocator's use of Licensed Space, unless caused by the Telephone Company's willful misconduct."

J. <u>Pacific Bell's Provisions Governing Relocation of EIS Customers' Facilities are Reasonable</u>

TCG is the only party to object to Pacific Bell's provisions governing the relocation of EIS customers.[102] TCG contends that the circumstances in which such relocations are permitted should be narrowly and specifically defined, although it does not propose any tariff language that would meet its requirements. TCG claims that stringent limitations on EIS customer relocations are needed because of the "potential for abuse." TCG's speculative assertion that absent strict limitations, "established collocation arrangements will be uprooted for no good reason" is not only unsupported, but ignores the cost and disruption that such moves cause Pacific Bell, and the potential adverse impacts to both interconnector and Pacific Bell customers.[103] Thus, aside from its exposure to an FCC complaint action and damages for arbitrary, unjustified customer relocations, an exchange carrier has a direct economic incentive to minimize such relocations.

TCG also contends that exchange carriers should be required to relocate customers in such a way that the "interconnector's customers experience no disruption in service."[104] As an initial matter, the quality of service provided to an interconnector's customer depends, of course,

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[102] TCG at B-16-17.

[103] Relocation would probably require relocation of Pacific Bell's EIS cross-connect facilities as well.

[104] TCG at B-17.

on the performance of the interconnector as well as the exchange carrier.[105] It would be entirely unreasonable to hold the latter responsible when the former's performance may cause or contribute to a service disruption.

More fundamentally, it would be unreasonable to require an exchange carrier to insure under any circumstances that an interconnector's EIS service will continue uninterrupted during a move. Consistent with its handling of other relocations of Special Access customers, Pacific Bell will take all reasonable steps to avoid such disruptions and to minimize their duration should they occur. Pacific Bell, however, cannot and should not be required to provide a guarantee.

Two further points raised by TCG concerning relocations warrant brief mention. Although it questions the scope and meaning of certain tariff provisions governing the reimbursement of costs incurred in a relocation, TCG does not appear to object to Pacific Bell's provision. TCG further observes that none of the exchange carriers agreed to eliminate excessive mileage charges that are caused by an interconnector's relocation to another central office at the instigation of the exchange carrier. In Pacific Bell's case, however, TCG's objection is inapposite. Pacific Bell's tariff

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[105] Under the terms of its tariff, if Pacific Bell requires an EIS customer to relocate its facilities, it will reimburse the EIS customer for all reasonable costs incurred by the customer in relocating its equipment. The EIS customer, not Pacific Bell, is responsible for arranging for the relocation of the customer's facilities.

provision applies only to relocation within the same central office.

With regard to the notification provision for interconnector relocation, TCG argues that a minimum of six months notice should be required in all cases.[106] Pacific Bell's tariff provides for ninety days advance notice for relocation. That is more than enough time for an EIS customer to make the necessary arrangements for starting relocation procedures, particularly in light of the limited amount of equipment that is involved, a fact that TCG stresses in other contexts.[107] TCG contends that a period of six months advance notice is required in order to reengineer and reroute customer traffic.[108] While this assertion may or may not be true for relocations between central offices, Pacific Bell's relocation provisions relate solely to moves within a central office. Because minimal, if any, circuit design is required for such moves, ninety days advance notice provides ample lead time for an intra-office move.

K. Pacific Bell's Insurance Provisions are Reasonable

Pacific Bell demonstrated in its Direct Case (at 79-81) that the insurance requirements applicable to its EIS customers are reasonable in light of the value of its facilities as well as those of other EIS customers that are

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[106] TCG at B-15.

[107] See e.g. TCG at B-21 ("few racks of multiplexing equipment").

[108] TCG at B-16.

located in central offices. Pacific Bell further showed that the EIS coverage requirements are substantially less than those that it maintains for its own facilities. MFS, nonetheless, claims that any level of insurance over $1-2 million is excessive and wholly unnecessary.[109] The premise for this claim is that there are no circumstances under which an interconnector could be liable for damages in excess of $1-2 million. That premise is patently false. The actions or inactions of an interconnector's employees or agents, or malfunction of the interconnector's equipment, obviously could be the cause of the catastrophic loss of an entire central office. In such a case, the interconnector would be liable for the damages, and it is reasonable to require insurance coverage against such a contingency.

MFS also contends, without support, that its proposed coverage requirement is an industry standard. In fact, the determination of an adequate level of insurance coverage is based on numerous factors and may properly vary on the basis of numerous differences among exchange carriers, including the location and value of the property being insured. That fact is evident from the insurance industry documentation submitted herewith which sets forth recommended insurance coverages, reflecting the degree of risk in doing business in California.[110]

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109 MFS at 23-24.

110 See Appendix A hereto, Practical Risk Management, Topic 6-2 (Umbrella Liability).

TCG simply ignores Pacific Bell's justification for its insurance coverage requirements. TCG attacks Pacific Bell's insurance coverage levels by claiming that the LECs have failed to "establish a reasonable nexus between the amount of insurance required and the degree of risk that a collocation arrangement adds to the central office."[111] But, the degree of risk added by collocation is exactly what Pacific Bell has weighed in developing its insurance coverage requirements. It is TCG that attempts to minimize the increased risk caused by the presence of EIS equipment and personnel in a central office. TCG contends that the <u>facilities</u> of such customers are the same as those already located on the premises. TCG pointedly ignores the risk associated with the presence of personnel in the central office that are not under the direct supervision or control of Pacific Bell. Moreover, the EIS facilities are neither owned nor maintained by Pacific Bell. When the nexus between coverage and degree of risk (including what is being placed at risk) is evaluated based on all relevant factors, as Pacific Bell did in conducting its analysis, its $5 million coverage requirement is entirely reasonable. That conclusion is reinforced by the fact that neither MCI nor Sprint, companies with far greater experience than TCG in evaluating degrees of risk to the provision of telecommunications service, object to Pacific Bell's insurance coverage level.

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[111] TCG at B-21.

TCG suggests that the Commission "require that all carriers allow self-insurance, subject to reasonable limits."[112] Pacific Bell's primary reason for not allowing self-insurance is that it has no desire to be subject to endless allegations of discrimination and continual disputes about whether what it requires or the criteria it uses to evaluate an interconnector's financial stability for self-insurance status are reasonable. TCG's comments in this proceeding illustrate precisely this problem. Specifically TCG contests the information that Pacific Bell indicated in its Direct Case would be required for it to determine whether an EIS customer could self-insure. Even if, arguendo, Pacific Bell were to accept TCG's unstated criteria, other EIS customers undoubtedly would object. It is neither desirable, necessary nor reasonable for the Commission to place Pacific Bell in such a "no win" situation. Additionally, the FCC is neither staffed to take on the role of insurance arbitrator, nor is it qualified to pass judgment in the specialized field of insurance coverage. The Commission should reject TCG's suggestion and avoid the morass of self-insurance by allowing Pacific Bell's self-insurance restriction to stand. That restriction is non-discriminatory and protects not only Pacific Bell, but also all interconnectors, who surely want to be assured of compensation in the event that their equipment is damaged by another interconnector.

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[112] TCG at B-22.

TCG erroneously argues that because the LECs' minimum rating requirements applicable to insurance carriers used by EIS customers are not uniform, the Commission should not permit exchange carriers to impose any such requirement.[113] Each company must evaluate and determine the degree of risk it finds to be reasonable. This judgement is reflected in the amount and type (including insurance carrier rating) of insurance an exchange carrier maintains for itself. An exchange carrier must exercise similar business judgement when establishing levels and terms of insurance for interconnectors. TCG's claim that interconnectors have a vested self-interest in obtaining insurance from a reputable insurer ignores the fact that they also have a vested self-interest in minimizing their short run costs, including their insurance costs. The latter self-interest may induce an interconnector to choose coverage at a low rate from a company unable to pay a large claim. That possibility is negated by specifying the level of insurance carrier rating. Inasmuch as TCG intends to use a reputable insurer, it should have no problem complying with Pacific Bell's requirement.

ALTS implies that requiring a certain insurance carrier rating may create a barrier to entry.[114] Any cost of doing business creates some barrier to entry. The issue is whether the barrier is <u>artificial</u> because it is unnecessary. For the

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[113] TCG at B-23.

[114] ALTS at 37-38.

reasons stated above, an insurance carrier rating is necessary and therefore does not present an artificial barrier to entry.

TCG states that insurance should not have to be in effect until occupancy.[115] However, once again, TCG fails to recognize that insurance will cover negligent acts or omissions by its employees. Insurance must be in effect when service begins whether the customer has occupied the space with its equipment immediately or not, since the customer's employees will have access to the central office at the point service begins. Negligence resulting in damage is possible at that point and coverage must commence at that point.

TCG also claims that its insurance policy may include confidential information.[116] That is a legitimate concern. Pacific Bell will amend its tariff to require that only the pertinent portions of the insurance policy must be provided. TCG's suggestion that simple proof of insurance should suffice is not acceptable since such proof would provide no details regarding various terms and exclusions which may reduce or restrict the coverage to unacceptable levels.[117]

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[115] TCG at B-23.

[116] TCG at B-24.

[117] Pacific Bell's Tariff (at § 16.2.5) specifies several provisions which must be included in the interconnector's insurance coverage and these requirements have not been contested by any commentors in these proceedings.

L. Pacific Bell's Limitations on Liability are Reasonable

Pacific Bell pointed out in its Direct Case (at 83-84) that the liability provisions in its tariff applicable to EIS are for the most part the same as those that have applied to other interstate access service customers for the past nine years, with one exception. The latter exception is favorable to EIS customers in that the tariff makes Pacific Bell liable for negligent acts of its agents and employees that cause physical damage to an EIS customer's facilities.[118]

TCG, MFS and ALTS contend that the standard of liability for EIS customers and exchange carriers should be identical, an argument they advanced previously in the tariff review phase of this proceeding. These parties, however, fail to address the substantive policy justifications for the liability provision presented in Pacific Bell's Direct Case. Specifically, Pacific Bell showed that the commercial relationship between an exchange carrier and an EIS customer is essentially the same as that between a landlord and a commercial tenant. Landlords typically shift the risk of liability to their tenants as a means of protecting the value of the landlord's real property and building against damage by a tenant or its agents. The relationship between Pacific Bell and its EIS customers is essentially the same and, thus, a similar allocation of risk is reasonable.

TCG and ALTS contend that the analogy between EIS customers and commercial tenants is inapposite because a

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[118] See Pacific Bell, Tariff F.C.C. No. 128, § 2.1.3(J).

commercial landlord "does not possess a monopoly on space."[119] That contention misses the mark. Neither party contends that the limitations on liability proposed by Pacific Bell differ materially from those that are typically found in landlord/tenant agreements emanating from the competitive real estate market. Thus, Pacific Bell has allocated liability between itself and its EIS customers on the same basis as TCG and ALTS would find under competitive conditions. Moreover, since Pacific Bell, unlike a commercial landlord, may not refuse to offer service to customers, it could justify shifting greater liability to an EIS customer than a commercial tenant ordinarily assumes. Pacific Bell, however, has made no such proposal.

MFS bases its claim for reciprocal liability on the false assertion that EIS customers are not really customers of exchange carriers, but rather should be viewed as "co-carriers that operate interconnected networks, with the same service obligations, and the same concerns over service quality and cost that LECs have."[120] In fact, EIS customers are quite different from exchange carriers. The most important and obvious difference is that EIS customers do not have the legal obligation to serve all qualified customers that exchange carriers have. EIS customers can provide their service in selected areas to selected customers in order to create favorable revenue to cost ratios and maximize profitability.

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[119] TCG at B-26. <u>See</u> ALTS at 14-15.

[120] MFS at 25.

Exchange carriers not only are the carriers of last resort, but also have an affirmative obligation to make service as universally available as possible. Exchange carriers interconnect their networks in order to transmit calls between service territories. EIS customers interconnect their networks with an exchange carrier's network in order to compete with the exchange carrier for high volume, high revenue customers.

MFS and others seek to claim the status of "co-carriers" here solely because they believe it is economically beneficial to them to do so. They express no desire, however, to assume the exchange carrier's broader public interest responsibilities in order to achieve "co-carrier" status. The Commission should not permit this self-serving tactic to succeed in securing preferential limitations on liability for EIS customers that other customers are not afforded. There is no sound justification for such discrimination.

MFS also asks the Commission to exculpate EIS customers from liability for consequential damages.[121] Pacific Bell's tariff holds an EIS customer liable for Credit Allowances that must be given to Pacific Bell customers as a result of damage or outages caused by willful misconduct or negligence of EIS customers.[122] This provision does not apply to other customers of access services because their facilities and

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[121] MFS at 26.

[122] <u>See</u> Pacific Bell, Tariff F.C.C. No. 128, § 16.2.4.

employees are not permitted within Pacific Bell's central office. It is because of the physical presence of EIS equipment and personnel in the very heart of the exchange carrier's network where negligence and misconduct by an EIS customer could disrupt the provision of service to thousands of end users, that EIS customers should be subject to liability for consequential damages as a deterrent to their malfeasance.

MFS and ALTS further make a claim based on a false premise. They contend that exchange carriers should not be permitted to waive liability for willful misconduct.[123] In fact, Pacific Bell's liability for willful misconduct to any access service customer is not limited by its interstate tariff.[124]

ALTS also seeks more favorable liability treatment under Pacific Bell's tariff than other customers of interstate access service receive. They seek to bar an exchange carrier from requiring indemnification from an EIS customer for the customer's negligence.[125] Pacific Bell is liable under its tariff for damage to an EIS customer's central office space or facilities located within the central office that is caused by Pacific Bell's negligence.[126] The latter provisions reasonably provide EIS customers more favorable liability

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[123] ALTS at 38; MFS at 26.

[124] See Pacific Bell, Tariff F.C.C. No. 128, § 2.1.3(A).

[125] ALTS at 38.

[126] See Pacific Bell, Tariff F.C.C. No. 128, § 2.1.3(D), (J).

treatment than other customers receive. But, Pacific Bell's tariff also generally requires interstate access service customers to indemnify it against any claim "arising out of any act or omission of the [customer] in the course of using services provided pursuant to [the] tariff."[127] ALTS is seeking more favorable treatment than is afforded other access service customers by this tariff provision without furnishing any basis that would justify such treatment. Its claim to preferential treatment should accordingly be rejected.

Finally, MFS incorrectly asserts that Pacific Bell's tariff "imposes liability on collocators for three years after the collocation arrangement is terminated."[128] Pacific Bell' tariff contains no such provision. Section 16.2.3, however, provides that "a collocator will continue, even after terminating EIS, to be liable for its actions or lack thereof arising out of its subscription to EIS." It would be unreasonable to hold an LEC liable for the actions or omissions of an EIS customer, even if the liability is not assessed until after the customer has terminated its service. Indeed, in the absence of such a provision, an EIS customer would have an incentive to terminate service in order to escape such liability. Thus, Pacific Bell's tariff reasonably holds EIS customers liable for damages caused by their actions or inactions, even if the liability accrues after they have terminated service.

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[127] Pacific Bell, Tariff F.C.C. No. 128, § 2.1.3(F)(3).

[128] MFS at 26, n. 49.